United States Court of Appeals

for the Second Circuit



BRIEF FOR APPELLANT

76-1115 & 76-1116

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In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES E. CORR, III, and
ROGER DRAYER,

Defendants-Appellants.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

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BRIEF OF DEFENDANT-APPELLANT ROGER DRAYER

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JAMES E. CORR, III, and
ROGER DRAYER,

Defendants-Appellants.

DEFENDANT-APPELLANT ROGER DRAYER'S BRIEF

PRELIMINARY STATEMENT

After a jury trial of approximately five weeks duration, defendant Roger Drayer ("Drayer") was convicted of conspiracy (18 U.S.C., Section 371), securities fraud (15 U.S.C., Sections 77 q(a) and 78 j(b)), and mail fraud (18 U.S.C., Section 1341). Co-defendant James E. Corr, III ("Corr") was convicted of conspiracy, unregistered sales of securities, mail fraud, making false statements on a bank loan application, perjury, and making false statements before the SEC.

The jury was unable to reach a verdict as to co-defendant Barry Drayer. On March 5, 1976 the trial court entered judgments of conviction against Drayer sentencing him to two years imprisonment, four months of which is to be served in a penal institution and the remainder suspended; and placing him on two years probation.

ISSUES PRESENTED

1. Should the charges against appellant Roger Drayer be dismissed for insufficient evidence?

2. Did the trial court's failure to exclude evidence of an alleged similar, unrelated act unfairly prejudice the jury against appellant?

3. Was appellant Drayer prejudiced by the trial court's failure to sever his trial?

THE INDICTMENTS

Drayer was charged under Indictment No. 75 Cr 803 (EW) with conspiracy (Count 1), violations of the anti-fraud provisions of the Securities Exchange Act of 1934 (Counts 12-22) and mail fraud (Counts 23-33). All charges in the indictment stem from an alleged scheme by co-defendant Corr to manipulate the price of shares in Jerome Mackey's Judo, Inc. ("Judo"), a publicly held company traded on the over-the-counter market. Co-defendant Corr was indicted under 75 Cr. 803 (EW) and charged with

conspiracy, unregistered sales of securities, securities fraud under the Securities Act of 1933, securities fraud under the Securities Exchange Act of 1934, mail fraud, making false statements in a bank loan application, perjury, and making false statements before the SEC.

The perjury and false statements counts were eventually dismissed and a new indictment (75 Cr. 1059 (EW)) was issued charging Corr with perjury and false statements before the SEC.

The two indictments were consolidated for trial. As to co-defendant Barry Drayer, the jury was unable to reach a verdict. Co-defendants R. Bruce Buschbaum, Barry Chaiet, Allan Kern, William Murphy and Richard Sobel all entered pleas of guilty to one felony count prior to trial by agreement with the government.

At the close of the government's case Counts 12 through 19 and 23 through 28 of 75 Cr. 803 were dismissed as against Drayer. The jury returned verdicts of guilty against Drayer on Counts 1, 21, 22 and 29 through 33. Judgment was entered thereon on March 5, 1976. It is from the judgment of conviction that Drayer now appeals.

THE FACTS

The vast bulk of the evidence presented during this five week trial related in some way to an alleged conspiracy to manipulate the price of Judo stock on the

over-the-counter market. At the center of this conspiracy, so the government contends, stands Corr; at the periphery, Drayer.

Drayer was a registered representative and a principal in Fingerhut & Co., Inc., a broker-dealer. In addition, Drayer was a partner in an investment partnership known as Jenny Associates.

Corr was employed by Judo and in addition was a large holder of Judo stock.

The conspiracy, it is claimed commenced in June of 1971 and continued on over a period of some two years. Drayer's activities which are claimed to have been in furtherance of the conspiracy, covered a period of six days during October of 1972. As against Drayer, the government presented evidence tending to show that during October of 1972 Drayer placed purchase orders for large amounts of Judo stock and subsequently failed to complete these transactions, i.e. pay for the stock. In addition, evidence showed that Drayer sent confirmations through the mails relating to some of these purchases. It is submitted that the government failed to prove that Drayer's actions were fraudulent or that Drayer acted in conspiracy with Corr. (POINT I below.)

Also admitted into evidence against Drayer was testimony regarding a transaction by Drayer in a stock known as "Ducatel". That evidence was to the effect

that Drayer placed an order to sell a large quantity of Ducatel and thereafter failed to deliver the stock, causing a substantial loss to the firm with whom the order was placed. It is submitted that this evidence was improper and unfairly prejudicial to Drayer in the eyes of the jury and should not have been allowed into evidence. (POINT II below.)

The balance of the evidence over the course of this five week trial had nothing to do with Roger Drayer. Included in that portion of the trial was evidence regarding Corr, his relationship with the other co-defendants; his part in the alleged conspiracy; his alleged perjury; his alleged false statements before the SEC; his alleged false statements on a bank loan application; and his activities relating to Judo.

POINT I

ALL COUNTS AGAINST APPELLANT SHOULD HAVE BEEN DISMISSED FOR INSUFFICIENT EVIDENCE.

Appellant Roger Drayer is charged with conspiracy, securities fraud and mail fraud. All of these charges stem from and relate to his alleged cooperation with defendant Corr in what the government contends was a scheme to manipulate the price of shares of Jerome Mackey's Judo, Inc. The trial of this action, some five weeks in duration, spans almost 5500 pages of transcript. The vast bulk of the evidence relates to Corr, whom the government pictures as the architect of,

and central figure in the alleged scheme. Throughout this voluminous transcript, references to Drayer, either directly or indirectly, are few and far between. The evidence shows, and, indeed, it is not denied, that Drayer was a registered representative, a principal in the firm of Fingerhut & Co. and a partner in an investment partnership known as Jenny Associates. The evidence shows further that, over a period of six days, Drayer placed several large orders for Judo shares which were not eventually paid for.

At trial, the government maintained that these orders were "wooden tickets"; that Drayer never intended to pay for them, and that, in concert with Corr, he placed these orders for the purpose of shoring up the price of Judo on the over-the-counter market. All of this, it is claimed, was part of a larger conspiracy to manipulate the market in Judo.

It is respectfully submitted that the government's view is wholly unsupported by the record. The government has failed to show a reasonable connection between Drayer's activities and any manipulation of Judo stock which Corr may or may not have been conducting. The record is devoid of any evidence by which it may be reasonably inferred that Drayer acted together with or at the direction of Corr.

By Corr's uncontradicted testimony, he (Corr) was totally unaware of Drayer's so-called wooden tickets and was not involved in any way in those transactions (Tr. pp. 3848-3851).

Corr's lack of prior knowledge of Drayer's activities is further demonstrated by the testimony of R. Bruce Buschbaum, a government witness and an indicted co-conspirator who pleaded guilty to one felony court prior to trial. Buschbaum had provided the United States Attorney's office with a handwritten statement (Tr. p. 806). Under cross-examination regarding a purchase order by Drayer for 10,000 shares of Judo, Buschbaum admitted that although his written statement indicated that Corr had spoken to him about this transaction before he heard from Drayer, in fact his conversation with Corr took place after Drayer called him (Tr. pp. 809-811), further indicating that Drayer's activities were unconnected with Corr's

The conspiratorial connection with Corr is the basis of all of the charges against Drayer. It is, as to Drayer, the vital element of each of the crimes charged.

It is respectfully submitted that the record fails to show that connection.[1/] Pursuant to the govern-

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1/ For the very same reason, if this court should dismiss the conspiracy counts against Corr, or order a new trial, Drayer should have the same relief.

ment's theory of the case, there has been a failure of proof and therefore, the indictment must fail.

POINT II

THE TRIAL COURT'S FAILURE TO EXCLUDE EVIDENCE OF AN ALLEGED SIMILAR ACT IMPAIRED DRAYER'S RIGHT TO A FAIR TRIAL.

Over the objections of counsel, the government was permitted, as part of its case-in-chief against Drayer, to adduce evidence of what was alleged to be a similar act by Drayer. (Tr. pp. 2939-2946.)

The court instructed the jury that the evidence was to be considered on the question of whether Drayer's conduct was "...willful and deliberate and purposeful" (Tr. p. 2940, L. 9).

The testimony referred to transactions by Drayer in a stock known as "Ducatel" wherein Drayer allegedly placed an order for the sale of Ducatel (Tr. p. 2941) and subsequently failed to deliver the stock (Tr. p. 2943), causing a loss to the market maker of some $65,000 (Tr. p. 2943).

The admissibility of such evidence is controlled by Federal Rules of Evidence, 404(b):

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

It is respectfully submitted that this evidence of a "similar act" was (1) error, and (2) highly prejudicial to Drayer.

In the instant case, the gravamen of the government's complaint against Drayer is that he submitted purchase orders for large amounts of a stock without intending to pay for same, as part of a conspiracy to support theprice of that stock. The "Ducatel" evidence, on the other hand, relates to an incident wherein it was alleged that Drayer placed an order for the sale of stock and later failed to deliver the shares. The testimony gives no indication that Drayer's actions were intentional or in any respect related to an illegal scheme to manipulate Ducatel.

While the probative value of this evidence is at best minimal, the jury would clearly get the impression from this evidence that Drayer was a dishonorable fellow or at least he was in the habit of not meeting his obligations.

In United States v. Knohl, 379 F.2d 427 (2nd Cir. 1967), cert. den., 389 U.S. 973, this court held at page 438:

> "Even in cases in which the evidence is offered to prove one of the enumerated exceptions to the rule, its probative value may be very slight while its prejudicial character may be very strong. Under such circumstances the trial judge has a duty in the exercise of his discretion, to exclude it."

It would seem that the Ducatel evidence does not even fit within the exceptions to the rule since it relates to a matter rather remote in circumstance to the acts charged in this case. However, even if the Ducatel evidence is held to be within the exceptions to the rule, it should have been excluded on the ground that its probative value was far outweighed by its potential prejudice to Drayer.

The Federal Rules of Evidence, 403 provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The trial court should have excluded the Ducatel evidence pursuant to Rules 403 and 404(b).

The effect of the "Ducatel" evidence was to damage Drayer in the jury's eyes without contributing to the evidence of his guilt. The sparsity of other evidence against Drayer only magnifies that damage.

POINT III

THE COURT SHOULD HAVE SEVERED DRAYER'S TRIAL.

Under Rule 14 of the Federal Rules of Criminal Procedure the court may grant severance to a defendant prejudiced by the joinder of offenses or of defendants.

In United States v. Kelly, 349 F.2d 720 (2nd Cir. 1965), cert. den., 384 U.S. 947 (1966), the court was faced with a strikingly similar situation as exists in the instant matter. The court there held that the denial of severance and a separate trial to a defendant in circumstances similar to those of Drayer was a prejudicial abuse of discretion.

The similarities between the position of the defendant in Kelly, supra, and Drayer are compelling. In Kelly numerous transactions covering a substantial period of time were executed by a "nucleus" and "hard core" group. After a considerable period of time had expired and a new impetus on the carrying out of the scheme was required, a new scheme with a peripheral defendant was begun.

The court in Kelly stated that the prejudice to the defendant was not apparent until after the trial had begun. At the very outset of the case defendant's counsel made a motion to sever which was denied.

During the course of the trial, the vast bulk of the evidence came in against Corr and was not related to Drayer.

This court stated in Kelly, supra, at page 759:

> "The principle and inevitable prejudice however, was caused by the slow but inexorable accumulation of evidence of fraudulent practices by Shuck's co-defendants...The ingenious schemes and designs they formulated...must have

> stamped them in the eyes of the jurors as unscrupulous swindlers of the first rank. That some of this rubbed off on Shuck we cannot doubt."

More recently, this court was called upon to consider a claim of prejudice resulting from a trial court's failure to sever a peripheral defendant.

The court stated in United States v. Branker, 395 F.2d 881 (2nd Cir. 1968), at page 888:

> "This kind of prejudice is particularly injurious to defendants...who are involved in only a small proportion of the evidence and who are linked with only one or two of their co-defendants. The jury is subjected to weeks of trial dealing with dozens of incidents of criminal misconduct which does not involve these defendants in any way. As trial days go by, 'the mounting proof of the guilty of one is likely to affect another.' Schaffer v. United States, 362 U.S. 511, 523, 80 S.Ct. 945, 952 (1960) (Douglas, J. dissenting). See Blumenthal v. United States, 332 U.S. 539, 559-60, 68 S.Ct. 248, 92 L. Ed. 154 (1947); United States v. Kelly, 349 F.2d 720, 759 (2nd Cir. 1965), cert. den., 384 U.S. 947, 86 S.Ct. 1467, 16 L. Ed.2d 544 (1966). See also Kotteakos v. United States, 328 U.S. 750, 775-777, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946); United States v. Bentrana, 319 F.2d 916, 956 (2nd Cir. 19), cert. den. sub nom.; Ormento v. United States, 375 U.S. 940, 84 S.Ct. 345, 11 L.Ed.2d 271 (1963)."

The court further recognized that the prejudice resulting from misjoinder cannot be overcome by any amount of cautionary instructions. Thus, the court said at page 889:

> "We accept the submission that the alternative of spending hours or even days telling the jury precisely what it is supposed to forget is not demonstrably superior to the method followed by the trial judge. In one view, the risk of prejudice to the taxpayer defendants by reason of the joinder was so great 'that no amount of cautionary instructions could have undone the harm.' United States v. Kelly, 349 F.2d 729, 758 (2nd Cir. 1965), cert. den., 384 U.S. 947, 86 S.Ct. 1467, 16 L.Ed.2d 544 (1966). See United States v. Patusso, 262 F.2d 194 (2nd Cir. 1958)."

The trial lasted over five weeks and the time devoted to defendant Drayer was minimal. Most of that time was used for the introduction of testimony and documentary evidence, massive in scope, relating to substantial sales and purchases of stock, false representations, bribery, perjury, and numerous other violations of the law, none of which were related to defendant Drayer.

Despite efforts by the court in the form of cautionary instructions to the jury, it is unlikely that, after such a long trial, the jury was able to sort out the evidence and determine Drayer's guilt or innocence solely on the basis of the trial evidence relating to him.

CONCLUSION

It is respectfully submitted that for all of the foregoing reasons all counts of the indictment against Defendant-Appellant Roger Drayer should be dismissed, or in the alternative he should be granted a new trial.

Respectfully submitted

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